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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

MATHEMATICS VISION PROJECT, LLC, a Utah Limited Liability Company, Plaintiff, vs. BLAIN DILLARD, an individual, Defendant.	**MOTION FOR JUDGMENT ON THE PLEADINGS** **(Hearing Requested)** Case No. 190401221 Judge James R. Taylor

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MOTION AND RELIEF SOUGHT

Pursuant to Rule 12(c) of the *Utah Rules of Civil Procedure*, Defendant Blain Dillard ("Dillard") hereby moves for Judgment on the Pleadings dismissing with prejudice each of Plaintiff Mathematics Visions Project, LLC's ("MVP") claims asserted in the complaint filed on or about July 25, 2019 ("Complaint"). The basis for this motion is that MVP's two causes of action against Dillard—Defamation: libel and slander and Tortious Interference with Business Relations—fail to state a claim on which relief may be granted. Pursuant to *Utah Rule of Civil Procedure* 7(h), Dillard requests a hearing on this motion.

INTRODUCTION

This case is about a company attempting to use the judicial process to punish a parent who dared to voice reasonable concerns that the company's educational program was not beneficial to his child and other similarly situated children. Instead of addressing such concerns in a productive dialogue, the company is seeking to silence them outright. But it is a parent's obligation, right, and privilege to take action and, in this case, speak publicly to government officials and institutions and to other interested parents about matters of such important public concern as the well-being and proper education of children. Moreover, the Supreme Court has time and again emphasized that commentary like the statements at issue here—issues of public importance—"occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Here, the principles of law making up that special protection require MVP's claims be dismissed as a matter of law.

In 2017, Dillard's son, LD, was a freshman in high school and was earning—and had always earned—A and B grades in his math courses. All of that changed in 2018, however,

when Dillard noticed that LD's grades in his sophomore Math 2 course declined suddenly and drastically to Ds and Fs. Like any concerned parent would do, Dillard began looking into the cause(s) of that decline. That inquiry and the information Dillard assembled suggested to Dillard that his county school district's adoption of MVP's methods and curriculum for math instruction was the predominant factor in his son's new difficulty with math. Specifically, MVP's products utilize a "discovery methodology" where students work in groups to figure out math concepts independently while teachers merely facilitate the discussion rather than actually teach, i.e., give instruction or explanations about fundamental concepts. This approach, which was quite new to the school district, obviously was not working for LD.

And Dillard very soon found that his son was not alone. Dillard encountered other parents in his county—Wake County, North Carolina—and elsewhere whose children's math performance was suffering under MVP's program and who were themselves raising concerns about MVP's methods and curriculum, including on various parent Facebook groups of which Dillard was aware. These parents attended protests and registered their concerns about MVP's program in school board meetings. A group of 16 parents even filed a formal complaint with the school district related to the MVP program. Students, too, spoke out about MVP's program; approximately 400 of LD's fellow students conducted a student-led walkout to protest the school district's use of MVP's products and methods.

For his part, Dillard sought to provide information about MVP's program to those interested. As a result, in late January 2019, Dillard created a Facebook group specifically dedicated to supporting parents of students using the MVP program, called "WCPSS[1] Parents of

[1] WCPSS refers to Wake County Public School System.

MVP Math Students." He also created a webpage (Wake County MVP Parent Page, wakemvp.com) and blog (Wake MVP Parent, wakemvp.blogspot.com) where he and others gathered research, resources, and data about MVP's programs, all in an attempt to encourage scrutiny and discussion by the Wake County school district, and others, of what he saw as educational techniques that were not well-received by students and that were not aiding their learning or growth.

Despite Dillard being just one of many parents who have spoken out about MVP's program, MVP has singled out Dillard for retribution. To do so, MVP cherry-picked seven statements from Dillard's publications and public comments about MVP and alleges that they are defamatory and that such defamation tortiously interfered with MVP's economic relations. MVP characterizes the statements at issue (the "Statements") as:

> 1. Dillard's March 27, 2019 blog post where "Dillard published a post titled 'MVP Eradicates WCPSS's Performance Lead,' wherein he claimed that WCPSS's math performance was decreasing and that MVP was the cause" and further made "statements claiming that the causational relationship was statistically provable." [Compl. ¶ 22.] This Motion will refer to this statement as the "**Math Performance Statement**," and a copy of the March 27, 2019 blog post is attached as Exhibit A.[2]
>
> 2. Dillard's March 28, 2019 blog post where "Dillard posted a fabricated story about two girls who had, allegedly, been severely negatively affected by MVP." [Compl. ¶ 20.] This Motion will refer to this statement as the "**Parody Post**," and a copy of the March 28, 2019 blog post is attached as Exhibit B.[3]
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> 3. Dillard's April 3, 2019 blog post stating that "'80-90%' of students using MVP are 'either drowning in math chaos Hell, or the teacher is partially

[2] The Math Performance Statement is also available at https://wakemvp.blogspot.com/2019/03/mvp-eradicates-wcpsss-performance-lead.html

[3] The Parody Post is also available at https://wakemvp.blogspot.com/2019/03/ready-set-no-story-of-miranda-and-neha.html.

supplementing the program to keep results afloat and attention down.'" [Compl. ¶ 16 (purporting to quote Dillard).] This Motion will refer to this statement as the "**Math Chaos Hell Statement**," and a copy of the April 3, 2019 blog post is attached as Exhibit C.[4]

4. Dillard's April 3, 2019 blog post where "Dillard claimed that he conducted a surveying [sic] showing that only 2% of teachers are supportive of MVP." [Compl. ¶ 18.] This Motion will refer to this statement as the "**Survey Statement**," and a copy of the April 3, 2019 blog post is attached as Exhibit C.

5. A document titled "Conversations/Interactions with American Fork High School Math Teacher" posted on the internet after May 10, 2019, indicating that "'Based on testimonies from teachers at American Fork High School in Utah who teach former students of MVP…, MVP is not effective.'" [Compl. ¶ 24 (purporting to quote Dillard).] This Motion will refer to this Statement as the "**Ineffective Statement**," and a copy of the entire referenced document is attached as Exhibit D.

6. Dillard's statement at an April 23, 2019 Wake County school board meeting that "'MVP's success data [has been] proven to have been exaggerated or in some cases possibly even fabricated.'" [Compl. ¶ 14 (purporting to quote Dillard).] This Motion will refer to this statement as the "**School Board Statement**."[5]

7. Dillard's May 26, 2019 Facebook post indicating "that math performance improvements from Chapel Hill and Wake County had been 'falsified.'" [Compl. ¶ 26.] This Motion will refer to this statement as the "**Facebook Post**," and a copy of the May 26, 2019 Facebook Post is attached as Exhibit E.[6]

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[4] The April 3, 2019 blog is also available at https://wakemvp.blogspot.com/2019/04/independent-surveys-of-wcpss-teachers.html.

[5] Dillard's full statement at the April 23, 2019 school board meeting can be accessed at https://www.youtube.com/watch?v=Sc_Ev3ZKpi4. Dillard's comments begin at the 1h:25m mark.

[6] Exhibits A-E and the hyperlinked video of the April 23, 2019 school board meeting are properly before this Court on a motion for judgment on the pleadings because such are referenced in and central to MVP's complaint. *See Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶¶ 12-15, 104 P.3d 1226 ("[If] a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." (internal quotation marks omitted)).

As explained below, however, none of the Statements can support any claim against Dillard, and MVP's claims should be dismissed as a matter of law. Defamation claims—like MVP's claim—are disfavored due to their potential to chill free speech, and are limited to words that expose a person to "public hatred, contempt, or ridicule." *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994)). Because "[d]efamation claims always reside in the shadow of the First Amendment," *Jensen v. Sawyers*, 2005 UT 81, ¶ 50, 130 P.3d 325, they are subject to various pleading and proof requirements and other standards that safeguard speech and require early dismissal when they are not met.

Such is the case with MVP's Complaint, which fails to state a claim against Dillard as a matter of law for no fewer than six reasons.

First, the Statements call into question only the quality of MVP's products and services and, as a result, cannot support a defamation claim. Instead, MVP's claim is properly viewed under Utah law as stating a claim for "injurious falsehood," not defamation. Injurious falsehood claims are narrower and harder to prove than defamation claims, requiring actual knowledge of falsity and specifically pled special damages, neither of which MVP has adequately pled.

Second, even if MVP's claim is treated as a defamation claim, the Statements are incapable of conveying defamatory meaning given the context in which they were made and their status as nonactionable opinion based on disclosed facts, satire or parody, and rhetorical hyperbole. Essentially, any reasonable reader would understand Dillard's Statements to be expressions of opinion, made during the course of a robust debate during which opposing parties are expected to express strong and divergent views. And those types of communications simply do not convey defamatory meaning.

Third, MVP has failed to plead facts sufficient to show that the Statements are false. Because the Statements concern matters of public interest, it is MVP's burden to plead the falsity of the statements, and MVP's mere conclusory allegations of falsity do not suffice.

Fourth, under Utah law, when a plaintiff pleads a claim for defamation *per quod*, rather than defamation *per se*, he must specifically plead "special damages," i.e., specific, measurable out-of-pocket losses. Because the Statements do not constitute defamation *per se*, and because the Complaint does not adequately allege special damages, MVP's claim should be dismissed.

Fifth, and in any event, the Statements are privileged under Utah's public interest, family relationship, and official proceedings privileges. Each of these privileges protects a father's right to speak openly and publicly on matters that concern his child and his child's education, particularly when they are expressed in connection with efforts to communicate with and participate in the decision making processes of government bodies and officials. To overcome these privileges, MVP is required to plead facts (not mere legal conclusions) supporting a showing that Dillard acted with either common law or actual malice. Because MVP has alleged no such facts, its defamation claim fails as a matter of law.

Finally, MVP's second claim for relief—tortious interference—is wholly dependent on its defamation claim. Because Dillard has not defamed MVP, he has not tortiously interfered with any of MVP's economic relations and that claim should be dismissed as well.

SPECIALIZED STANDARD OF REVIEW

"[A] motion for judgment on the pleadings is reviewed under the same standard as … a motion to dismiss" and should be granted "if, as a matter of law, the [non-moving party] could not recover under the facts alleged." *Golding v. Ashley Cent. Irr. Co.*, 793 P.2d 897, 898 (Utah

1990). In this inquiry, "[m]ere conclusory allegations …, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal." *Kuhre v. Goodfellow*, 2003 UT App 85, ¶ 21, 69 P.3d 286 (internal quotations omitted). Nor is this Court bound to accept legal conclusions, deductions, and opinions couched as facts. *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 16, 263 P.3d 397.

Because MVP's claim implicates free speech and First Amendment concerns, however, the standard of review departs from the typical. As the Utah Supreme Court has explained:

> Generally, when an appellate court reviews the district court's decision to grant a motion to dismiss for failure to state a claim upon which relief may be granted, "we accept as true all material allegations contained in the complaint and all reasonable inferences drawn therefrom." *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994). We review these rulings under a correctness standard because whether a particular array of allegations set out a cognizable cause of action is purely a question of law. *Id.* When reviewing claims of defamation, however, a reviewing court takes a slightly different approach. As we stated in *O'Connor v. Burningham*, "the presence of the First Amendment demands a subtle although significant variation in the treatment of inferences drawn from undisputed facts." 2007 UT 58, ¶ 24, 165 P.3d 1214. The reviewing court must look to the context of the allegedly defamatory statement and then, in a nondeferential manner, "reach an independent conclusion about the statement's susceptibility to a defamatory interpretation." *Id.* ¶ 26. Whether a statement is susceptible to a defamatory interpretation is a question of law. *Id.* Therefore, we cede no discretion to the district court's view on this question. Nor do we indulge Mr. Jacob by interpreting inferences that may be reasonably drawn from the statements in favor of a defamatory meaning. *Id.* ¶ 27. As we stated in *O'Connor*, "To accommodate the respect we accord its protections of speech, the First Amendment's presence merits altering our customary rules of review by denying a nonmoving party the benefit of a favorable interpretation of factual inferences." *Id.*

Jacob v. Bezzant, 2009 UT 37, ¶ 18, 212 P.3d 535.

Further, because this case involves the First Amendment, there is a strong policy in favor of disposing of deficient claims at an early stage in the litigation to prevent the chilling of free speech. Courts routinely decide First Amendment issues as a matter of law, rather than letting

such issues go to trial, because of the constitutional interests at stake. *See, e.g.*, *West*, 872 P.2d at 1015 n.27 ("[B]oth this court and the United States Supreme Court have expressed a preference for pretrial resolution of defamation actions when it appears that a reasonable jury could not find for the plaintiffs." (internal quotations omitted)).

For the reasons set forth below, these special legal standards for cases involving First Amendment interests weigh heavily in favor of granting Dillard's Motion and dismissing MVP's claims on the pleadings.

ARGUMENT

MVP's attempt to stifle public criticism of its product and to punish a parent for exercising his right to speak on matters that impact his child and other children fails for multiple reasons. Ultimately, the law protects both what Dillard said and his right to say it. Because MVP's claims cannot subsist in the face of those protections, MVP's Complaint should be dismissed in its entirety and as a matter of law.

I. MVP'S DEFAMATION CLAIM IS ACTUALLY A CLAIM FOR INJURIOUS FALSEHOOD AND IS NOT ADEQUATELY PLED.

Although MVP labels its cause of action as one for "defamation," courts "pay little heed to the labels placed on a particular claim, favoring instead an evaluation based on the essence and substance of the claim." *Jensen*, 2005 UT 81, ¶ 34. And the substance of MVP's defamation claim is not defamation, but rather a distinct tort called "injurious falsehood" (sometimes referred to as "business disparagement"). This distinction matters because the elements of the two claims are slightly but meaningfully different.[7]

[7] The tort of injurious falsehood encompasses two related claims known at common law as "slander of title" and "trade libel." "Slander of title has traditionally addressed statements

Though injurious falsehood shares some vocabulary with the tort of defamation, "there is a basic distinction between the two" and "[t]hey protect separate and unrelated interests." *Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988). Injurious falsehood is "based on an intentional interference with economic relations" and unlike defamation, does "not protect a person's reputation." *Id.*; *see also Sack on Defamation* § 13:1.4[B]. "[T]he common law has always distinguished between statements which impugn a person's reputation and those which disparage a product and it has always given the owner or marketer of a product very limited rights against the publisher of statements which disparage the product." *Melaleuca, Inc. v. Clark*, 78 Cal. Rptr. 2d 627, 637 (Cal. Ct. App. 1998).

Thus, a plaintiff's claim that he has been harmed in some way by an allegedly false statement is not automatically a claim for defamation. The subject matter of the statement controls. And it has long been the law in Utah that where the statement concerns "the quality of plaintiff's product," as the Statements do, the claim is one for injurious falsehood, not defamation. *Direct Import Buyers Assoc. v. KSL, Inc.*, 538 P.2d 1040, 1042 (Utah 1975) ("*Direct Import I*") (applying injurious falsehood elements despite plaintiff labeling its claim "libel and slander"), *overruled in part on other grounds*, 572 P.2d 692 (Utah 1977) ("*Direct Import II*"); *Mile High Contracting v. Deseret News Publ'g Co.*, No. 170906024 MI, 2018 WL 7374786, at *6 (Utah Dist. Ct. March 16, 2018) (holding claim pled as defamation was actually

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casting doubt upon the fact or the extent of a plaintiff's ownership of property, most often real estate." 2 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 13:1.1 (4th ed. 2016) (hereinafter, "*Sack on Defamation*"). "The tort of disparagement of quality, or 'trade libel,' developed from slander of title. It provides compensation for false derogatory statements about the quality, rather than the ownership, of property, most often a product or service being sold." *Id.*

claim for injurious falsehood and dismissing for failure to adequately plead that tort); *see also* *Watkins v. Gen. Refractories Co.*, 805 F. Supp. 911, 917 (D. Utah 1992) ("[I]njurious falsehood concerns statements regarding the quality of the plaintiff's product or the character of the plaintiff's business. By contrast, a defamation claim concerns statements about an individual's reputation." (citation omitted)).

Ultimately, a statement must do more than impugn the quality of a plaintiff's goods or services to cross the line from injurious falsehood into defamation. It must attack directly the integrity and character of the business in a manner beyond the quality of its performance, such as by alleging "'fraud, deceit, dishonesty, or reprehensible conduct in its business.'" *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 924 (3d Cir. 1990) (citation omitted); *see also* Restatement (Second) of Torts § 626 cmt. d (1977) (statement that "attack[s] the quality of the thing in question and does not attack the personal character of its owner as vendor or lessor" is injurious falsehood, not defamation).

> Thus, if a statement accuses an individual of personal misconduct in his or her business or attacks the individual's business reputation, the claim may be one for defamation per se; however, if the statement is directed towards the quality of the individual's product or services, the claim is one for business disparagement.

Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc., 213 P.3d 496, 504 (Nev. 2009).

The Utah Supreme Court's decision in *Direct Import I* is instructive. In that case, a company claimed that its product increased gas mileage and reduced pollution when used in a carburetor, but the media defendant reported that (a) an independent lab determined that the product did not improve mileage and could cause burned valves and admit dust into the engine; (b) though the company represented that testing on the product was going "very well," an individual involved in that testing reported that he noticed no improvement in gas mileage; (c) an

auto executive thought the product was a waste of money; (d) the product would be unlawful if it made a car's air pollution control equipment less effective, and testing on the product found that it increased hydrocarbon and nitrogen oxide emissions; and (e) the company, in addition to claiming to be developing a new engine that yields 60-70 miles per gallon, was "close to a cure for cancer and the common cold." *Direct Import I*, 538 P.2d at 1041-42. Though the company asserted a claim for libel and slander based on these statements, the court determined that the claim sounded in injurious falsehood because the statements were "merely a depreciation of the quality of plaintiff's product." *Id.* Indeed, in a subsequent appeal, the same court stated that "[w]hile the words used cast doubt on the efficacy of the [product], they did not in any manner whatsoever reflect on the character, reputation, or want of skill on the part of [plaintiff]." *Direct Import II*, 572 P.2d at 694. Stated differently, accusing a business of making unsupported claims of success and of selling a product that an individual in the industry thought was a waste of money, that did not have the efficacy the business claimed, and that was perhaps, illegal, was not the same thing as directly attacking the business's reputation or character. The same is true here.

None of the Statements crosses the line from injurious falsehood into defamation. Indeed, the Statements each are directed at the quality or efficacy of MVP's products and services. And nothing in the Statements accuses MVP of deceit, fraud, or dishonesty or otherwise attacks the personal character of its owners.[8] If simply accusing a business of offering

[8] Though the School Board Statement and the Facebook Post mention "fabricated" and "falsified" data, respectively, nothing in those statements accuses MVP of such fabrication or falsification. As a result and as it concerns MVP, both statements merely suggest that MVP's program is not as successful as its success data seems to show. This amounts to nothing more than a complaint about the quality and efficacy of MVP's products and services and any claim based on those statements is one for injurious falsehood, not defamation. Even if that were not the case, alleging that a company misstates the effectiveness or the success of its product is not

substandard products and services satisfied the defamation standard, there would be no separate tort of injurious falsehood—defamation would swallow it entirely. At most, the Statements consist of garden-variety customer complaints expressing dissatisfaction with a product likely to be seen on any consumer review website. Such falls squarely within the realm of business disparagement, not defamation.[9]

This conclusion has immediate terminating consequences for MVP's defamation claim. By design, "injurious falsehood is a far more difficult cause of action than defamation to sustain[.]" *Sack on Defamation* § 13:1.4[A]. Two differences are particularly relevant here—actual malice and special damages.[10]

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defamatory, as the court found in *Direct Import I.* 538 P.2d at 1041-42 (statement calling into question company's statement that testing on product was going well was injurious falsehood).

[9] This conclusion does not diminish the First Amendment protections attendant to claims based on speech, however, such as the protections requiring exacting and non-deferential review. "There is no reason to accord lessened protection because the plaintiff's claim is denominated 'disparagement,' 'trade libel,' or 'injurious falsehood' rather than 'libel' or 'slander' or because the injury is to economic interests rather than to personal reputation. Since only economic injury and not injury to reputation and psyche is at issue, perhaps the balance should tip even further to the side of free expression." *Sack on Defamation* § 13:1.8; s*ee SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1293 (D. Utah 2010) ("[T]he Court finds that slander of title claims are subject to the First Amendment."); *cf. Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999) (applying First Amendment opinion protection to injurious falsehood claim under Colorado law); *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249 (D. Mass 1981) (applying First Amendment actual malice standard to product disparagement claim), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

[10] The other two elements of an injurious falsehood claim are (1) publication of a disparaging statement regarding the plaintiff's goods or services, and (2) falsity. *Dillon*, 2014 UT 14, ¶ 36. MVP cannot satisfy these two elements either. But because they are essentially the same as the defamatory meaning and falsity elements for a defamation claim, Dillard discusses them with the defamation analysis below to avoid repetition.

First, a plaintiff asserting injurious falsehood must plead and prove that the defendant published the alleged statements with "actual knowledge that the statements at issue were false." *Dillon v. S. Mgmt. Corp. Ret. Trust*, 2014 UT 14, ¶ 35, 326 P.3d 656.[11] This is a subjective, not objective, inquiry. *Id.*

The Complaint's conclusory allegation that "Dillard knew these statements were false" at the time he made them, [Compl. ¶¶ 28, 36], does not satisfy MVP's pleading obligation, absent well-pled facts to support that conclusion. *Kuhre*, 2003 UT App 85, ¶ 21 (conclusory allegations are insufficient). And the Complaint contains no such facts. As a result, MVP has not adequately alleged that Dillard published the statements with actual malice.

Second, injurious falsehood claims "require a plaintiff to prove special damages," *i.e.*, specific, measurable out-of-pocket losses. *Bass*, 761 P.2d at 568; *see also Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.*, 505 F.Supp.2d 1178, 1191 (D. Utah 2007); *Dillon*, 2014 UT 14, ¶ 36. These damages must be pled with specificity. *See id.*; Utah R. Civ. P. 9(h). "There are no general or presumed damages" in injurious falsehood cases. *Bass*, 761 P.2d at 568.

The Complaint likewise fails this requirement to plead in detail the customers or accounts that it had and lost to quantify such losses with specificity, all of which Utah courts require. *See*

[11] *Dillon* resolved several decades of confusion on this "malice" element. Earlier courts had inconsistently suggested that malice for purposes of injurious falsehood could consist of ill will, or that a plaintiff could allege that the defendant objectively "should have known" of the falsity of certain statements. *Compare Direct Import II*, 572 P.2d at 696 (requiring "actual malice" for disparagement of quality claim) *with First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253, 1257 (Utah 1989) (appearing to allow a showing of malice from proof "that the wrong was done with an intent to injure, vex, or annoy"); *see also Bass*, 761 P.2d at 568 n.1 ("We forgo defining the term 'malice' in this opinion. We note, however, that the concept is not altogether clear under Utah law." (collecting cases)).

Diesel Power Source v. Crazy Carl's Turbos, Inc., No. 2:14-cv-00826-DN, 2017 WL 1131892, at *3 (D. Utah March 24, 2017) ("special damages require the pleading of considerable detail"). Instead, MVP makes a general averment of harm to its reputation and then, based on "information and belief" speculates that MVP has experienced other generalized harms, which are presented in a list separated by an "and/or" conjunctive.[12] [Compl. ¶ 29.] In other words, MVP guesses that it may have experienced some type of harm, but cannot and does not say with any exactness what that harm may be. This is not sufficient. *See Mast v. Overson*, 971 P.2d 928, 933 n.6 (Utah Ct. App. 1998) ("[P]laintiffs who cannot show [concrete] damage should … refrain from filing suit precipitously and then hoping to exploit discovery tools to uncover some previously unknown negative comment….Rule 11 only bolsters that prescription.").

Because MVP's defamation claim is, in substance, a claim for injurious falsehood, and because MVP has failed to allege at least two essential elements of that claim, this Court should dismiss it as a matter of law.

II. THE STATEMENTS ARE NOT ACTIONABLE BECAUSE THEY ARE NEITHER DEFAMATORY NOR FALSE.

Even if MVP's claim is treated as one for defamation, it still fails as a matter of law because MVP has not identified any statement by Dillard that is both defamatory and false. As an initial matter, however, this Court's analysis of MVP's defamation claim must be based on

[12] MVP does something similar in its allegations supporting its tortious interference claim. [Compl. ¶¶ 40-44.] Though MVP identifies Guilford Public School System as the subject of Dillard's alleged interference, these allegations are not enough to allege special damages, even if they applied to MVP's defamation claim. Like its previous allegations, MVP's tortious interference allegations list only possible harms separated by "and/or" and never identifies which, if any, actually occurred. [Compl. ¶ 43.] And, again, MVP makes no attempt to quantify losses it experienced from Dillard's alleged interference.

statements that Dillard actually made, not on MVP's characterization of those statements. This is particularly important where MVP's characterizations are at odds with Dillard's actual speech. Under such circumstances, Dillard's actual statement controls, and the Court need not accept as true MVP's characterizations in the Complaint. *See In re FX Energy, Inc. Sec. Litig.*, Nos. 2:07-cv-874 CW (consolidated), 2009 WL 1812828, at *6 (D. Utah June 25, 2009).

A. THE MATH PERFORMANCE STATEMENT IS NOT ACTIONABLE.

Though MVP alleges that Dillard, in the Math Performance Statement, claimed a "causational relationship" between MVP's program and decreasing math performance in Wake County and that such was "statistically provable," his actual statement disclaimed any such relationship, as this excerpt shows:

> I continue to be skeptical of all WCPSS's Year 1 (2017-2018) MVP data claims due to the secret mystery algorithm used to calculate the performance numbers, which were reported without the context of the state numbers. But mainly, due to the widely irregular adoption we have seen of MVP in Wake County, how can anyone make cause-and-effects claims, including me? That said, it's the only data we have, and this report shows that EDS and LEP students are getting the shaft."

[*See* Exhibit A (emphasis added).] This excerpt, placed in the context of the March 27 blog post as a whole and viewed along with the broader context of the dispute related to MVP's products, is what the Court must review—not MVP's skewed characterization. And the actual statement is neither defamatory nor false.

1. The Math Performance Statement is Not Susceptible to Conveying Defamatory Meaning and is Protected Opinion.

To be actionable as defamation, a statement must be capable of conveying a defamatory meaning. *West*, 872 P.2d at 1008. This determination is a threshold question of law for this Court and must be made before any defamation claim is allowed to proceed. *See O'Connor*,

2007 UT 58, ¶ 26. Moreover, the defamatory meaning inquiry is context-driven. *Id.* ("Because the existence of defamatory content is a matter of law, a reviewing court can, and must, conduct a context-driven assessment of the alleged defamatory statement and reach an independent conclusion about the statement's susceptibility to a defamatory interpretation."). Rather than looking at each Statement in isolation, this Court "must carefully examine the context in which a statement was made" to determine if a Statements is capable of being defamatory in the manner alleged. *West*, 872 P.2d at 1009.

In that examination, "'the guiding principle is the statement's tendency to injure in the eyes of its audience' when viewed in the context in which it was made." *Mast*, 971 P.2d at 932 (quoting *West*, 872 P.2d at 1008-09). To be defamatory, the statement must expose the plaintiff to "public hatred, contempt, or ridicule." *Hogan*, 762 F.3d at 1106. "If no defamatory meaning can reasonably be inferred by reasonable persons from the communication, the action must be dismissed for failure to state a claim." *Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988). If this Court determines that, given the overall context in which the statements appeared and the nature of the speaker as a partisan advocate, a reasonable reader is "not apt to take [the statements] at face value," MVP's claims fail as a matter of law. *Mast*, 971 P.2d at 933; *Cox*, 761 P.2d at 561 (affirming dismissal of defamation claim because publication not defamatory as a matter of law). This is the case *even if* this Court assumes that the statements are false and derogatory:

> A publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even because it makes a false statement about the plaintiff. Thus, an embarrassing, even though false, statement that does not damage one's reputation is not actionable as libel or slander. *If no defamatory meaning can reasonably be inferred by reasonable persons from the communication, the action must be dismissed for failure to state a claim.*

Id. at 561 (emphasis added); *see also West*, 872 P.2d at 1009.

Similarly, statements that constitute expressions of opinion, rather than statements of verifiable fact, are not actionable as defamation. *See id.* at 1018. Instead, to state a defamation claim, a plaintiff must allege defamatory statements of fact that are "capable of being objectively verified as true or false." *Id.* Like the other issues presented in this Motion, this is a question of law for this Court. *Id.*; *Ferlauto v. Hamsher*, 88 Cal. Rptr. 2d 843, 849 (Cal. Ct. App. 1999) ("The critical determination of whether an allegedly defamatory statement constitutes fact or opinion is a question of law for the court and therefore suitable for resolution by demurrer." (internal quotations omitted)); Restatement (Second) of Torts § 566 cmt. c (1977).

And, like defamatory meaning, the opinion/fact distinction is a context-driven inquiry, depending not only on "the full context of the statement—for example, the entire article or column—in which the statement is made," but also on "the broader setting in which the statement appears." *West*, 872 P.2d at 1018. This context-based inquiry renders statements nonactionable even when, in some other context, they "might be considered as statements of fact." *Ferlauto*, 88 Cal. Rptr.2d at 849. For example, it is well established that opinions expressed in the context of disclosed, true facts are protected speech because "when the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts." *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995); *see also, e.g.*, Restatement (Second) of Torts § 566 cmt. c (1977) ("A simple expression of opinion based on disclosed ... nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is."). And "if it is plain that the

speaker is expressing a subjective view, an interpretation, a theory, a conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

Ultimately, "[w]here potentially defamatory statements are published in a public debate … or in another setting in which the audience may anticipate efforts by the parties to persuade others to their position by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered a statements of fact may well assume the character of statements of opinion." *Gregory v. McDonnel Douglas Corp.*, 552 P.2d 425, 430 (Cal. 1976).

The Math Performance Statement is not defamatory under these standards. Utah law is clear that a statement is not defamatory merely because it contains "sharp criticism." *West*, 872 P.2d at 1009. It must, instead, damage the plaintiff's reputation and expose the plaintiff to public hatred, contempt, and ridicule. *Id.* at 1008. Suggesting that a MVP's program is not effective and has not had a positive impact on students is not defamatory. *See Direct Import I*, 538 P.2d at 1041-42 (finding similar statements to be nondefamatory).

This is particularly true given the context in which the Math Performance Statement was made—an ongoing public debate amongst parties with differing viewpoints about the efficacy and usefulness of an educational program—which is readily apparent to anyone reading the post. No one would assume such to be an unbiased statement of pure fact. *See, e.g.*, *Mast*, 971 P.2d at 932 ("[T]he context of [defendant's] statement informed the reader or listener they were merely a continuation of a heated political debate, and the statements did not present a likelihood the audience would form a personal animus towards [plaintiff]. In colloquial terms, [defendant's] statements would necessarily be taken with a grain of salt.");

1107 (10th Cir. 2014) (allegedly defamatory statements that plaintiff was terminated due to "performance issues" and "erratic behavior" were nonactionable because they were "part of the back-and-forth of a contentious dispute that no reasonable reader would take at face value").

The forum in which the Math Performance Statement was published—Dillard's "Wake MVP Parent" blog—only strengthens that conclusion. That blog describes itself as "[a] blog from a parent's point of view about MVP math in Wake County, NC." *See* Exhibit A. That description—which appears atop each post—and the nature of the blog itself would lead any reasonable reader to be "predisposed to view [the blog posts] with a certain amount of skepticism, and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts." *Summit Bank v. Rogers*, 142 Cal. Rptr. 3d 40, 60-63 (Cal. Ct. App. 2012); *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1294 (9th Cir. 2014) (reaching same conclusion about statements posted on "obsidianfinancesucks.com"); *Sack on Defamation*, § 4:3.1 ("If a statement appears in a place usually devoted to, or in a manner usually thought of as representing, personal viewpoints, it is also likely to be understood—and deemed by a court—to be nonactionable opinion."). After all, "[o]nline blogs ... are places where readers expect to see strongly worded opinions rather than objective facts." *Summit Bank*, 142 Cal. Rptr. 3d at 60-63; *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, No. CV 10-5696 CRB, 2013 WL 3460707, at *4 (N.D. Cal. July 9, 2013) (stating that readers are less likely to view statements on personal blogs as assertions of fact; citing cases). Readers of blogs, like readers of op-ed columns, are "fully aware that the statements found there are not 'hard' news like those printed … in the news sections of the newspaper. Readers expect that [bloggers] will make strong statements, sometimes phrased in a polemical manner that will hardly be considered balanced or fair." *See*

Ollman v. Evans, 750 F.2d 970, 986 (D.C. Cir. 1984) ("Columnists are, after all, writing a column, not a full-length scholarly article or a book. This broad understanding of the traditional function of a column … will therefore predispose the average reader to regard what is found there to be opinion."). As a result, readers of blogs are "less likely to form personal animus toward [a company] based on statements made in [a blog]." *See West*, 872 P.2d at 1009.

In any event, the Math Performance Statement's expressions of opinion are based on disclosed true facts. Specifically, the post provides a hyperlink to data issued by North Carolina's Department of Public Instruction ("DPI") showing testing results for students.[13] *See Edwards v. Schwartz*, 378 F.Supp.3d 468, 519 (W.D. Va. 2019) (citing document hyperlinked to the alleged defamatory publication as disclosing facts upon which opinions in publication were based); *Abbas v. Foreign Policy Group, LLC*, 975 F.Supp.2d. 1, 16-17 (D.D.C. 2013) (same). All of Dillard's analysis and comments in the Math Performance Statement are based on this data, which he encourages readers to check for themselves. Indeed, the bulk of the post merely reformulates that data into bar charts, upon which Dillard bases his opinions. And Dillard makes clear he is expressing only opinion by specifically disclaiming any attempt to draw a statistically proven causal relationship between the data and MVP's program.

[13] Also hyperlinked in the March 27, 2019 blog post is a post from March 21, 2019, titled "Why my MVP Golf Score Improve, and other Exaggerations." *See* Exhibit F. This post also discloses the DPI data and offers opinions on those facts. The DPI data and the March 21, 2019 blog post are properly before the Court because they were referenced and hyperlinked in the Math Performance Statement, which is central to and referenced in the Complaint. *See Oakwood Village LLC*, 2004 UT 101, ¶¶ 12-15. Even if that were not the case, because the DPI data is a public record, it is a proper subject of judicial notice. *See* Utah R. Evid. 201(b)(2), (d) ("[A]t any stage of the proceeding," the court has authority to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Lehi Irr. Co. v. Jones*, 202 P.2d 892, 895 (Utah 1949) (judicial notice may be taken of state agency documents as public records).

In light of the context of these disclosed, true facts, "no reasonable reader would consider" Dillard's statements to be "anything but the opinion of the author drawn from the circumstances related." *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993). Indeed, the Math Performance Statement's most reasonable interpretation is a concerned parent's "personal conclusion about the information presented, not ... a statement of fact." *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730 (1st Cir. 1992); *see also, e.g.*, *Moldea v. New York Times Co.*, 15 F.3d 1137, 1144-45 (D.C. Cir. 1994) ("Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation."). As a result, the Math Performance Statement is not capable of conveying defamatory meaning and is nonactionable option. MVP's defamation claim based on that statement should be dismissed on these grounds as a matter of law.

2. MVP Has Not Pled Facts Showing the Math Performance Statement Is False.

Even if the Math Performance Statement was capable of defamatory meaning, which it is not, MVP has failed to adequately plead that the statement is false.

Under Utah law, falsity is an essential element of a defamation claim. *West*, 872 P.2d at 1007. Because the Math Performance Statement involves a matter of public concern—the education and well-being of children and operation of schools—it is MVP's burden to plead facts that, if proven, would show the falsity of the alleged statements. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 776 (1986). It is also MVP's burden to plead the elements of its defamation claim, including the element of falsity, with specificity. *See Dennett v. Smith*, 445 P.2d 983, 984 (Utah 1968); *Nelson v. Target Corp.*, 2014 UT App 205, ¶ 25, 334 P.3d 1010.

MVP has not come close to satisfying these burdens. Nowhere in the Complaint does MVP allege any well-pled facts establishing that the Math Performance Statement is false. MVP resorts instead to the mere conclusory statement that "[t]hese statements were and are false, defamatory, and not subject to any privilege." [Compl. ¶ 23.] This is not sufficient to assert a prime facie defamation claim. *Kuhre*, 2003 UT App 85, ¶ 21; *Commonwealth Prop. Advocates, LLC*, 2011 UT App 232, ¶ 16 (courts are not bound to accept as true legal conclusions, deductions, and opinions couched as facts).[14]

These deficiencies alone are fatal to MVP's defamation claim related to the Math Performance Statement and justify dismissal. *See, e.g.*, *Jacob*, 2009 UT 37, ¶¶ 21-22 (affirming dismissal of defamation claim on motion for judgment on pleadings where plaintiff failed to meet burden of alleging facts showing falsity).

B. THE PARODY POST IS NOT DEFAMATORY.

The second of Dillard's statements of which MVP complains is the Parody Post—a March 28 blog post. *See* Exhibit B. Though MVP describes the post as "a fabricated story about two girls who had, allegedly, been severely negatively affected by MVP,"[15] [Compl. ¶ 20], the post actually is what any reasonable reader would recognize as satire or parody and cannot support a defamation claim.

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[14] MVP's inability to plead actual facts showing falsity has a simple explanation: the statements in the Math Performance Statement are substantially true. In that blog post, Dillard reproduced data generated by DPI to show how economically disadvantaged students ("EDS") and students with limited English proficiency ("LEPS") had faired in Wake County. And the DPI data shows that the EDS and LEPS groups' performance rates in Wake County were on a downward projection since introduction of MVP's program. MVP makes no attempt to allege otherwise.

[15] Even MVP's basic summary misrepresents the post. In Dillard's fictionalization, only one student is portrayed as having a negative experience with MVP's program.

1. The Parody Post is Not Susceptible to Conveying Defamatory Meaning.

The same contextual inquiry that rendered the Math Performance Statement nondefamatory produces the same conclusion with respect to the Parody Post. Given the non-neutral circumstances of the post, its forum, and its author, no one would assume the post to contain unbiased statements of pure fact. *See Section* II.A.1, *supra*.

The nature of the post—it being a parody piece—only strengthens that conclusion. Figurative language such as satire, parody, and rhetorical hyperbole, have a time-honored and protected role in our nation's public discourse. *See Mink v. Knox*, 613 F.3d 995, 1005 (10th Cir. 2010). "The First Amendment's shielding of figurative language reflects the reality that exaggeration and non-literal commentary have become an integral part of social discourse." *Id.* at 1006. These types of expressions "cannot reasonably [be] interpreted as stating actual facts about an individual," and because "no reasonable person would take these types of speech as true, they simply cannot impair one's good name." *Id.* at 1005 (internal quotation marks omitted); *see Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 380 (Utah Ct. App. 1997) ("Under the law of defamation, '[a] parody or spoof that no reasonable person would read as a factual statement, … cannot be actionable as defamation.'" (quoting *Walko v. Kean College*, 561 A.2d 680, 683 (N.J. Super. Ct. Law Div. 1988)). Again, context is key. Context "can turn what, out of context, appears to be a statement of fact into 'rhetorical hyperbole,'" and "[e]ven false statements of fact" are not actionable if a reasonable reader would recognize the statements as satire or parody. *Mink*, 613 F.3d at 1005-06.

These standards shield the Parody Post. In the post, Dillard first proposes "let's do an MVP exercise" and then embarks on a story about "Miranda and Neha" who "are best friends,"

who "hope to go [to] college together and be roommates" and who both "sign up for Math 1 Honors in 8th grade." *See* Exhibit B. From this beginning and the context of the post as a whole, the two girls and the story are obviously a fictional parody and no reasonable reader would think otherwise. *See Busch v. Viacom Int'l, Inc.*, 477 F.Supp.2d 764, 775 (N.D. Tex. 2007) ("[B]ecause Plaintiff's image appears in a 'fake endorsement' of Robertson's diet shake on *The Daily Show*, a satiric program, no reasonable viewer would have believed that the challenged clip contained assertions of fact about Plaintiff."). Indeed, the story is rightly recognized as an attempt to use figurative language to illustrate concerns about MVP's program rather than to suggest that Miranda and Neha were actual students who actually had the depicted experiences.

Consequently, the Parody Post is not defamatory cannot support MVP's claim.

C. THE MATH CHAOS HELL STATEMENT IS NEITHER DEFAMATORY NOR FALSE.

MVP alleges that Dillard's statement, in an April 3, 2019 blog post, that "80-90%" of students are "drowning in math chaos Hell" is defamatory. [Compl. ¶ 16.] Dillard's actual statement, however, is materially different:

> While WCPSS and MVP have **never** conceded that this program **might not work for some** teachers & students, **Wake MVP parent does concede that there are some teachers and some students, when paired together, the MVP experience may be math Heaven on Earth**.[16] For the other 80% - 99%, they are either drowning in math chaos Hell, or the teacher is partially supplementing the program to keep results afloat and attention down."

See Exhibit C. Any claim related to this statement fails as a matter of law.

[16] The underlined portion of the statement is a hyperlink to another post on the Blog. *See* Exhibit G. Because it is referenced in the Math Chaos Hell Statement, Exhibit G is properly before the Court. *See* pp. 20-21 & n.13, *supra.*

1. The Math Chaos Hell Statement is Not Capable of Conveying Defamatory Meaning and is Protected Opinion.

Again, the Court must evaluate the alleged defamatory statement in the context of the overall dispute related to MVP's efficacy. For the same reasons already discussed, *see Section* II.A.1, *supra*, readers would understand that the statement was being made in a blog post by a non-neutral party expressing a particular opinion that is based on disclosed facts, *see* Exhibit G; no one would assume that Dillard meant to express unvarnished statements of fact.

As an initial matter, because alleging that teachers are partially supplementing MVP's program with other methods does not subject MVP to public hatred, contempt, or ridicule and comments only on the quality of MVP's product, MVP presumably is relying on the statement that students are in "math chaos Hell" to support its defamation claim. But the Math Chaos Hell Statement is just the kind of classic rhetorical hyperbole or "loose, figurative" language that cannot reasonably be understood as conveying facts about the plaintiff.[17] *Mink*, 613 F.3d at 1005; *Milkovich v. Lorain Journal*, 497 U.S. 1, 21 (1990). No reasonable reader would, for instance, understand Dillard to be claiming that students were *in fact* drowning in an actual math hell, whatever that might mean.

This is because "math chaos Hell" does not mean much of anything at all, which is fatal to MVP's claim. Under Utah law, "the common usage or the meaning of the words used" and "whether the statement is capable of being objectively verified as true or false," along with the immediate and broader context of the statement, are factors useful in distinguishing fact from

[17] Moreover, because Dillard's statement suggests that 80-90% of students are either in math chaos Hell, or the teacher is supplementing MVP's program with other methods, it is the kind of mere hypothesis or speculation that signals to the reader that it is an opinion rather than fact. *See* Section II.F.1, *infra*.

opinion. *West*, 872 P.2d at 1018 (citing with approval the test established in *Ollman*, 750 F.2d at 979). Where the words used are "indefinite" and "ambiguous" and lack a "precise core of meaning for which a consensus of understanding exists," those words typically are expressions of opinion and cannot support a claim for defamation. *Ollman*, 750 F.2d at 979 ("[S]tatements that are 'loosely definable' or 'variously interpretable' cannot in most context support an action for defamation."). And where no clear method of verification exists to evaluate a statement, "a reader cannot rationally view an unverifiable statement as conveying actual facts." *Id.* at 981.

Here, the statement that 80-90% of students are drowning in math chaos Hell has no precise meaning and is not capable of verification. Under *West* and its ilk, that statement is thus nonactionable opinion, particularly in the context in which it was made. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 862-63 (9th Cir. 1999) (calling someone "a Jimmy Hoffa" was the kind of "figurative rhetoric" that a reasonable audience expects during a public debate and was not provable as true or false); *see West*, 872 P.2d at 1010 (citing cases deciding that "exaggerated commentary" such as "traitor," "scalawag," "rake," and "scoundrel" is not likely to damage reputation).

2. MVP Has Not Pled Facts Showing the Math Chaos Hell Statement is False.

Even if the Math Chaos Hell Statement could be seen as conveying facts, MVP has not sufficiently alleged that such facts are false. As explained above, falsity is an essential element of a defamation claim, and it is MVP's burden to plead falsity with requisite specificity. *See* Section II.A.2, *supra*. The bare conclusion that MVP offers is not sufficient. [Compl. ¶ 17.]

D. THE SURVEY STATEMENT IS NEITHER DEFAMATORY NOR FALSE.

For its fourth alleged defamatory statement, MVP cherry-picks another statement from the April 3, 2019 blog post—the Survey Statement—to suggest that Dillard claimed to have "conducted a survey[] showing that only 2% of teachers are supportive of MVP." [Compl. ¶ 18.] But MVP's characterization is not controlling where it is inaccurate, as it is here. The actual post included the following:

> A few weeks ago, I … gathered over 400 math teacher email addresses. I sent them a survey and invited them to give feedback. I identified that this was a parent initiated survey, not from WCPSS. I promised confidentiality. As expected, once administration caught wind of this, some teachers were warned or instructed to NOT respond. As expected, I got responses anyway—27 in total, plus several emails and phone calls. As expected, some (9 out of ~400, 2%) were very very-and I mean very supportive of MVP. Now, this was not a scientific survey, and response (especially negative) was discouraged. So we can't really compare raw numbers of supporters versus non-supporters since one of those groups could be punished for responding….Again, this is NOT a scientific survey.

See Exhibit C. For reasons that follow, the Survey Statement cannot support a defamation claim.

1. The Survey Statement is Not Capable of Defamatory Meaning and is Protected Opinion.

The Survey Statement, like the others already discussed, would not subject a company to public hatred, contempt, or ridicule and is part of a larger, contentious debate about the proper education of students in Dillard's county and posted on a blog meant to express a parent's view of that debate. *See Section* II.A.1, *supra*. Understood in that context, the Survey Statement is not capable of defamatory meaning for the same reasons discussed above.

Moreover, criticizing a company's product by saying only a percentage of teachers are "supportive" of it is the kind of imprecise language that has no definite and fixed meaning and that is not capable of verification. *See Ollman*, 750 F.2d at 979 (citing cases holding that calling

judge "incompetent" or a newspaper's reporting "sloppy and irresponsible" are too imprecise to support a claim for defamation); *see also Direct Import I*, 538 P.2d at 1041-42 (statement that auto executive thought product was waste of money was not defamatory).

Finally, the Survey Statement is opinion based on disclosed facts and, as a result, is protected speech. In the April 3 post, Dillard explains the survey he conducted of 400 teachers and the results of that survey. This data is disclosed to the reader, and Dillard's conclusions are based on that data, but are also qualified by Dillard's warning that the survey is neither scientific nor comprehensive, given its limitations. *See* Exhibit C. Under these circumstances, Dillard's statements are nonactionable opinion. *See* Section II.A.1, *supra.*

2. MVP Has Not Pled Facts Showing the Survey Statement is False.

Even if that were not the case, MVP has not adequately pled that the Survey Statement is false. For example, MVP has not pled that Dillard did not send a survey to approximately 400 teachers and that Dillard did not receive only nine responses that were supportive of MVP's program. Instead, MVP has, again, in a conclusory fashion only alleged that the statement is false, [Compl. ¶ 19], which is insufficient as a matter of law.[18] *See Section* II.A.2, *supra*.

E. THE INEFFECTIVE STATEMENT IS NEITHER DEFAMATORY NOR FALSE.

MVP's fifth statement supporting its defamation claim is the Ineffective Statement, an excerpt from a complaint document prepared and submitted by parents to the Wake County school district ("Parent Complaint"). [Compl. ¶ 24.] The excerpt MVP identifies (just one

[18] And, again, MVP cannot plead the falsity of the Survey Statement because it is substantially true, as proven by the information disclosed in the April 3, 2019 blog post, which reports teacher responses and contains a hyperlink to the actual survey.

sentence from a 41-page document), however, is edited to suggest that the statement "MVP is not effective" was based only on testimonies from teachers at American Fork High School. The actual statement is materially different:

> Based on testimonies from teachers at American Fork High School in Utah who teach former students of MVP founding owner and curriculum author Travis Lemon (See EXHIBIT E: Conversations/Interactions with American Fork High School Math Teachers) and Testimonies from WCPSS teachers (See EXHIBIT F: Testimonies from WCPSS Teachers About MVP Issues), **MVP is not effective."**

See Exhibit D, p.7 (emphasis added). The document goes on, in the exhibits referenced in the Statement, to reproduce the "testimonies" from both sets of teachers. This is the information Court must analyze to determine whether MVP's claim can survive this Motion.

1. The Ineffective Statement is Not Capable of Conveying Defamatory Meaning and is Nonactionable Opinion.

Under the defamatory meaning and opinion standards already explained and given that the statement was made in a complaint document submitted to the Wake County school board, *see Section* II.A.1, *supra*, the Ineffective Statement is not actionable as defamation. It does not expose MVP to public hatred, contempt, or ridicule and no reasonable reader would understand it as expressing verifiable facts rather than opinion based on disclosed facts. Moreover, calling a company's product "not effective" is the kind of imprecise language that has no definite and fixed meaning and that is not capable of verification. *See Hogan*, 762 F.3d at 1106-07 (statements that contractor was terminated for "performance issues" and had exhibited "erratic behavior" were too vague and subjective to be defamatory); *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762, 773 (Iowa 2006) (references to dog kennel as "substandard and poor performers" did not have precise and verifiable meaning); *see also Direct Import I*, 538 P.2d at

1041-42 (statements suggesting that company's product was not effective were not defamatory). As a result, it cannot support a claim for defamation.

2. MVP Has Not Pled Facts Showing the Ineffective Statement is False.

MVP's claim based on the Ineffective Statement also fails because MVP has not adequately pled the falsity of the statement, which is its burden. *See Section* II.A.2, *supra.* True, MVP uncharacteristically offers more here than a mere conclusory allegation that the statement is false. It alleges that the statement is false because Teacher D, an American Fork High School teacher that expressed dissatisfaction with MVP, later retracted his comments. [Compl. ¶¶ 24-25.] But contrary to MVP's assertions,[19] Teacher D was not the only American Fork High School teacher dissatisfied with MVP's program. The Parent Complaint reports Teacher A as stating "From my brief interactions with [MVP's program], we as a department saw many issues with it and haven't ever pushed for it at our school." *See* Exhibit D, p.22. Thus, MVP has not pled facts showing that Dillard's actual statement—that testimonials from American Fork High School and Wake County teachers suggest that MVP ineffective—is false. MVP's claim based on the Ineffective Statement should, accordingly, be dismissed.

F. THE SCHOOL BOARD STATEMENT IS NEITHER DEFAMATORY NOR FALSE.

MVP next identifies as defamatory a statement Dillard made at a Wake County school board meeting about data purporting to show the success of the MVP program in Wake County. Specifically, Dillard stated that "MVP's success data [has] proven to have been exaggerated or in some cases possibly even fabricated." [Compl. ¶ 14.]

[19] This Court need not accept as true allegations by MVP that contradict the content of documents before the Court, including the Parent Complaint.

1. The School Board Statement is Not Capable of Conveying Defamatory Meaning and is Nonactionable Opinion.

Like the other Statements at issue in this dispute, the School Board Statement was made in the course of a public debate about the efficacy of an educational curriculum, during which partisans would be expected to voice strong views. *See Section* II.A.1, *supra*. Given that context, the School Board Statement is not capable of conveying defamatory meaning.

More fundamentally, however, the School Board Statement is not actionable as defamation because it does not subject MVP to public hatred, contempt, or ridicule. *West*, 872 P.2d at 1008; *see Direct Import I*, 538 P.2d at 1041-42 (statement calling into question company's assertions about effectiveness of product was not defamatory). The mere suggestion that a business's success has been "exaggerated" is not the type of statement that injures a business in the eyes of an audience, since reasonable readers expect (and the law does not punish) puffery in the advertisement of a business's products. *See McBride v. Jones*, 615 P.2d 431, 434 (Utah 1980) ("It is true that in usual commercial transactions, statements as to value, subsequently found to be false, may be tolerated as expressions of opinion or puffery."). MVP can rely only on the statement that MVP's success data was "in some cases possibly even fabricated" to support its defamation claim. But even that statement is not actionable.

First, nothing in Dillard's statement accuses MVP of fabricating success data. This is key because an attribution of fabrication is the only potentially defamatory hook in the School Board Statement. Without the assertion that MVP was responsible for fabricating data, the statement is not capable of conveying defamatory meaning as against MVP.[20]

[20] Said another way, MVP cannot show that the School Board Statement is "of and concerning" MVP, which is an essential element of a defamation claim. *See West*, 872 P.2d at 1007 ("To

Second, even if this were not the case, the statement does not convey defamatory meaning because it is phrased as a mere hypothesis or speculation, which "signals the reader that what is said is opinion, and not fact." *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997). Indeed, the School Board Statement does not state that data has been fabricated, only that it has been "exaggerated or in some cases possibly even fabricated." Courts have long recognized similar statements as protected opinion given their speculative nature. *See Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 250 (1st Cir. 2000) (finding statement that "Casey may have asked Gray to take on these controversial clients—for the purpose of spying on them" was speculation and that such was nonactionable option (emphasis added)). This is particularly true where the statement is based on disclosed facts. *Id.*; *Restatement (Second) of Torts*, §566, comment (c). And, here, Dillard had disclosed the facts upon which his statement was made, including in blog posts that disclose MVP's "success data" and the actual DPI data upon which it was based. *See* Exhibits A and F.[21]

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state a claim for defamation, [plaintiff] must show that defendants published the statements concerning [plaintiff]…." (emphasis added)). This requirement "is not a mere superficial technicality or trivial detail of American defamation law. Rather, [it] is a basic cornerstone doctrine that reflects the deepest and most fundamental social policies embodied in the law of defamation." 1 Rodney A Smolla, *Law of Defamation* § 4:40.50 (2d. ed.). The burden of satisfying this requirement is not light and is a question of law for the court to decide. *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 65 N.E.3d 35, 37 (N.Y. 2016).

[21] The Court should consider Dillard's blog posts when deciding whether the School Board Statement is actionable. Under Utah law, the Court is obligated to consider the context in a statement is made to determine whether it is defamatory. *Jacob*, 2009 UT 37, ¶ 18. That inquiry often involves consideration of publications beyond the statement at issue. *See id.* ¶ 27-28. This is particularly true where the statement is one in a series of publications that build on and add to each other. As a result, in *Jacob*, the court considered not just the election notice at issue, but the advertisement to which it responded and the general dispute between two parties. *Id.*

2. MVP Has Not Alleged Facts Showing the School Board Statement is False.

Even if the School Board Statement was somehow capable of conveying defamatory meaning, MVP has not adequately alleged that it is false. *See Section* II.A.2, *supra.* MVP relies, again, on a conclusory allegation that the statement is false without any well-pled facts that would prove falsity, specifically that MVP's success data has not been exaggerated or fabricated and that such success data is accurate. MVP's claim based on the School Board Statement accordingly fails as a matter of law.

G. THE FACEBOOK POST IS NEITHER DEFAMATORY NOR FALSE.

The final statement that MVP identifies as defamatory is an excerpt from a Facebook post referencing "misleading and falsified success gains from Chapel Hill and Wake County" (the "Facebook Post"). *See* Exhibit E. This statement is neither defamatory nor false for the same reasons discussed above with respect to the School Board Statement, and any claim based on the Facebook Post should be dismissed as a matter of law. *See Section* II.F, *supra*.

III. THE STATEMENTS ARE NOT DEFAMATORY *PER SE* AND MVP HAS NOT PLED SPECIAL DAMAGES.

As noted above, MVP has failed to plead special damages, instead asserting only generalized statements of harm. A plaintiff who fails to plead special damages can state a defamation claim only if the statements he alleges are defamatory *per se*, as opposed to *per quod*. *See Baum v. Gillman*, 667 P.2d 41, 42-43 (Utah 1983); *Jacob*, 2009 UT 37, ¶¶ 26-29, 31 (dismissing defamation claim on motion for judgment on the pleadings in part because statements constituted defamation *per quod* and plaintiff failed to plead special damages). And because the statements alleged by MVP are not defamatory *per se*, MVP's claim fails.

Defamation *per se* is a strictly limited category under Utah law. As the Utah Supreme Court has explained:

> In order to constitute slander *per se*, without a showing of special harm, it is necessary that the defamatory words fall into one of four categories: (1) charge of criminal conduct, (2) charge of a loathsome disease, (3) charge of conduct that is incompatible with the exercise of a lawful business, trade, profession, or office; and (4) charge of the unchastity of a woman. If the words spoken do not apply to one of the foregoing classifications, special harm must be alleged.

Allred v. Cook, 590 P.2d 318, 320 (Utah 1979).

The only category on which MVP possibly could rely is the third category—charge of conduct that is incompatible with the exercise of a lawful business, trade, profession, or office. In order to be actionable under this category, however, the words used must "impute a want of capacity or fitness for engaging in the plaintiffs' profession or … render him unfit to fulfill his duties." *Allred*, 590 P.3d at 320; *see also Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 800-01 (D. Utah 1988) (statement that individual had engaged in actions that violated contracts was not *per se* defamatory because it would not "reflect so poorly on [the man's] capacity or fitness" to engage in his profession). Indeed, the statement "must, as its natural and proximate consequence, compel the conclusion that plaintiff will be damaged." *Larson v. SYSCO Corp.*, 767 P.2d 557, 560 (Utah 1989).

The Statements are not defamatory *per se* under this standard because they criticize only MVP's products and services, which, as discussed above, is an action for injurious falsehood, not defamation. *See* Section I, *supra*. And even if MVP's claim did sound in defamation, the Statements would not qualify as defamation *per se*. "[A] communication is defamatory per se if it imputes misconduct in a person's trade, profession, office, or occupation. A mere expression of dissatisfaction with a person's professional performance is not defamatory per se." 50 Am.

Jur. 2d Libel and Slander § 205 (emphasis added); *Am. Needle & Novelty, Inc. v. Drew Pearson Mktg., Inc.*, 820 F. Supp. 1072, 1075–76 (N.D. Ill. 1993) ("Although the September 17th letter uses passionate words…the words nevertheless fail to accuse American Needle of fraud or mismanagement, nor do they impugn its business integrity….As such, American Needle's claim of libel *per se* fails."). The Statements, by merely criticizing MVP's product, do not impute any misconduct to MVP and, thus, are not defamatory *per se.*

The School Board Statement and the Facebook Post are not defamatory *per se* for an additional reason: both are susceptible to multiple interpretations. Under Utah law, "[t]he statement or charge in question must not be susceptible to any meaning other than one falling plainly and unambiguously within any of the four categories … If it is capable of two interpretations … 'it cannot be slander per se.'" *Johnson v. Comm. Nursing Servs.*, 985 F. Supp. 1321, 1328 (D. Utah 1997) (quoting *Allred*, 590 P.2d at 321).

Though MVP likely will claim that both the School Board Statement and the Facebook Post accuse MVP of being untruthful or misleading the public by "falsifying" or "fabricating" success data, Dillard's statements do not accuse MVP of doing any such thing. Indeed, his statements do not accuse any party of such conduct and, as a result, can be interpreted as attributing that conduct to some party other than MVP. Moreover, the School Board Statement suggests that MVP's success data has been "exaggerated or in some cases possibly even fabricated. Because that statement suggests only that it may have been fabricated, it is susceptible to multiple interpretations that do not fall into the four *per se* categories. *See Progress Solar Solutions, LLC v. Fire Protection, Inc.*, No. 5:17-CV-152-D, 2019 WL 3544072, at *4 (E.D.N.C. Aug. 1, 2019) (holding that statement was not defamatory *per se* because

statement that company only "may" have infringed patents was not susceptible to only one interpretation). Indeed, the statement could be interpreted as suggesting only that MVP's data has been exaggerated, which, as discussed previously, is not capable of defamatory meaning.

Because MVP has not alleged defamation *per se*, it is required to plead and prove special damages with requisite specificity, *Baum*, 667 P.2d at 42-43; *Jacob*, 2009 UT 37, ¶¶ 26-29, 31, which, as discussed above, it has not done.

IV. THE STATEMENTS ARE PRIVILEGED.

Even if MVP had adequately pled the elements of a defamation claim based on the Statements, its claim would still fail. Dillard's efforts to safeguard the best interests, well-being, and success of his son and other similarly situated students by voicing and publishing his concerns about MVP's program are privileged under several well-recognized privilege doctrines, including the public interest privilege, the family relationships privilege, and the official proceedings privilege. MVP has not pled any facts that could support a finding of malice necessary to overcome any of those privileges. Whether these privileges apply is a question of law for this Court. *Russell v. Thomson Newspapers Inc.*, 842 P.2d 896, 900 (Utah 1992); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991). So, too, is the question of whether MVP's allegations are sufficient to support a finding of malice. *Russell*, 842 P.2d at 905.

A. THE PUBLIC INTEREST PRIVILEGE APPLIES.

First, the statements are protected by Utah's public interest privilege, which is designed to promote uninhibited public discourse by providing a qualified privilege for publications on matters of public interest. *See* Utah Code §§ 45-2-3(5), 45-2-10(4). The privilege applies if "the publication ... of the matter complained of was for the public benefit."

itself does not define the types of publications that are for the "public benefit," the Utah Supreme Court has made clear that publications concerning public health and safety, the functioning of governmental bodies, officials, or public institutions or the expenditure of public funds fall within the ambit of the privilege. *See, e.g.*, *Jacob*, 2009 UT 37, ¶¶ 24-25; *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 978 (Utah 1981); *Cox*, 761 P.2d at 559 n.3 (recognizing public interest qualified privilege).

Here, there is little question that the Statements fall within the ambit of the public interest privilege. Dillard's Statements directly concern the efficacy of an educational method being used to instruct children and whether that method is having a negative impact on student learning and success. This is obviously a problem affecting schools, and Utah courts recognize that "'[i]t seems clear ... that problems affecting our schools are matters in which the public has a legitimate interest.'" *Seegmiller*, 626 P.2d at 978 (quoting *Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222, 224 (Utah 1976)).

Moreover, the statements also concern the expenditure of public funds (payment for the educational program or method) and the functioning of governmental bodies and officials and public institutions (Wake County school district and other school districts considering using the program). Because the Statements concern these matters of public interest, the conditional privilege applies. *See, e.g.*, *Jacob*, 2009 UT 37, ¶¶ 24-25.

B. THE FAMILY RELATIONSHIP PRIVILEGE APPLIES.

Dillard's Statements also are privileged under Utah's conditional privilege for family relationships. *O'Connor*, 2007 UT 58, ¶ 34. This privilege protects statements where "the circumstances induce a correct or reasonable belief that (a) there is information that affects the

well-being of a member of the immediate family of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the well-being of the member of the family." *Id.* ¶ 36 (quoting Restatement (Second) of Torts § 597).[22] In *O'Connor*, for example, the court determined that parents "possess a legitimate interest in the affairs of the basketball team of such a degree" as to require that their statements criticizing the coach receive "the 'breathing space' afforded by [the family relationship privilege.]" *Id.* ¶ 37.

Dillard's Statements also deserve such breathing space. The circumstances of those Statements induce a correct and reasonable belief that Dillard was relating information that affected Dillard's child and that publication of that information to school board members and other parents[23] would serve to protect the well-being of that child, including by inducing the school board and other parents to inquire into MVP's program and support a change in curriculum. Under these circumstances, Dillard's comments were privileged.

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[22] Even if Dillard's comments were not in service in the lawful protection of his own child, they would be privileged in service in the lawful protection of other children in his own school district and those in other school districts using or considering using MVP's curriculum and methods. *See O'Connor*, 2007 UT 58, ¶ 34. The scope of the privilege extends to information that affects and will be in service of the lawful protection of the well-being of an immediate family member of the recipient or of a third person and where the recipient of the information "is a person to whom its publication is otherwise within generally accepted standards of decent conduct." *Id.* In providing information about MVP to parents of other students and to members of school boards and school districts making decisions about MVP's program, Dillard was well within this privilege. *See id.* ¶ 37 ("[The privilege] does protect those defendants who are not immediate family members of women on the team.").

[23] *See Lee v. Fick*, 37 Cal.Rptr.3d 375, 380 (Cal. Ct. App. 2005) ("In order to be effective in pressing their complaints to school authorities, parents must be free to communicate with each other without fear of liability.").

C. THE OFFICIAL PROCEEDINGS PRIVILEGE APPLIES.

Finally, certain of Dillard's statements are privileged pursuant to the official proceedings privilege. This privilege protects the "publication or broadcast of or any statement made in any legislative or judicial proceeding, or in any other official proceeding authorized by law." Utah Code. § 45-2-3(2). Such privilege is "designed to provide the utmost freedom of communication between citizens and public authorities whose responsibility it is to investigate wrongdoing." *Lee*, 37 Cal.Rptr.3d at 379. As a result, the official proceedings privilege applies to "a variety of public proceedings." *Russell*, 842 P.2d at 901 n.11 (citing case where court found statements to school board were subject to official proceedings privilege). Moreover, the privilege extends not just to statements made during a proceeding, but also to "communications to an official agency intended to induce the agency to initiate action" since those are deemed part of the official proceeding. *Lee*, 37 Cal.Rptr.3d at 370; *Rykowsky v. Dickinson Pub. Sch. Dist. No. 1*, 508 N.W.2d 348, 351 (N.D. 1993). Crucially for this dispute, the official proceedings privilege has been applied across the country to statements made in school board meetings or to school boards. *See, e.g.*, *Stablein v. Schuster*, 455 N.W.2d 315 (Mich. Ct. App. 1990) ("Plaintiffs' claim that the school board meeting is not a public and official proceeding has no merit."); *Rykowsky*, 508 N.W.2d at 351 ("School board meetings have been recognized as 'official proceedings authorized by law' within the meaning of [similar statute]"); *Lee*, 37 Cal.Rptr.3d at 379 (communications with school board privileged); *see also Lovett v. Capital Principles, LLC*, 686 S.E.2d 411, 414 (Ga. Ct. App. 2009) ("[S]chool Board's consideration or review of the issues of how to implement the computer program …was an 'official proceeding authorized by law' within the meaning of the anti-SLAPP statute…").

The official proceedings privilege thus applies at least to the School Board Statement, the Facebook Post, and the Ineffective Statement. All three involve direct communications with school boards either during or in connection with a school board proceeding or in an attempt to induce such a proceeding.

D. MVP CANNOT OVERCOME THESE PRIVILEGES.

MVP can overcome these privileges only by showing that Dillard acted with either common law malice or actual malice in publishing the statements at issue. *See Russell*, 842 P.2d at 905 & n.28 (common law malice); *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 28, 221 P.3d 205 (actual malice). "Whether the evidence ... is sufficient to support a finding of malice is a question of law." *Russell*, 842 P.2d at 905.

MVP cannot satisfy this standard because its Complaint contains no facts whatsoever that Dillard acted with either common law or actual malice. MVP alleges only in conclusory fashion that "Dillard knew these statements were false and made these statements with the intent to harm MVP" and "Dillard knew these statements were false or acted with reckless disregard for the truthfulness of these statements" and "intended to harm MVP." [Compl. ¶¶ 28, 36-37.] The Complaint does not allege any facts supporting such conclusory allegations. In the absence of such facts, MVP cannot state a claim for defamation. *See Combes v. Montgomery Ward & Co.*, 228 P.2d 272, 277 (Utah 1951); *Russell*, 842 P.2d at 905 n.28; *Sheehan v. Anderson*, No. 98–5516, 2000 WL 288116, at *3 (E.D. Pa. Mar. 17, 2000) ("Simply asserting that publication is made with malice is not sufficient."); *Miketic v. Baron*, 675 A.2d 324, 330-31 (Pa. Super. Ct. 1996) (dismissing complaint for failure to "demonstrate facts which would support a finding that

the publication was a result of malice or improper purpose," and requiring factual basis for state of mind ascribed to defendants).

V. MVP'S TORTIOUS INTERFERENCE CLAIM FAILS AS A MATTER OF LAW.

Finally, MVP's tortious interference claim is premised entirely on allegedly defamatory speech that supposedly interfered with MVP's business relationship. In other words, the gravamen of MVP's tortious interference claim is allegedly injurious speech.

It is well settled that a tortious interference claim predicated on allegedly injurious speech, like MVP's here, must surmount all of the constitutional and common-law limitations and privileges applicable to a defamation claim. This requirement is *in addition* to satisfying each of the separate elements for tortious interference, including improper means. *See Sack on Defamation* § 13:4 ("As has been the case with invasion of privacy, ... there is substantial recent authority that principles and limitations derived from libel law also apply to [intentional interference] torts when the gravamen of the claim is an allegedly false and injurious statement."). If the law were otherwise, a plaintiff could simply relabel a nonactionable defamation claim as "tortious interference" and thereby "evade the constitutional, statutory, and common-law strictures on causes of action for defamation." *Id.*; *see also, e.g.*, *Blatty v. New York Times Co.*, 728 P.2d 1177, 1183 (Cal. 1986) ("First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement," because such limitations "do not concern matters peculiar to [defamation] actions but broadly protect free-expression and free-press values."); *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1200-01 (10th Cir. 2007) ("If the alleged impropriety ... is an allegedly defamatory statement, then the interference claim must fail if the statement is not an actionable defamation....

The interests served by [the protections afforded speech from a defamation claim] would be undermined if the common law recognized a different tort based on the same speech.").[24]

Indeed, Utah courts and others applying Utah law have repeatedly applied defamation limitations and privileges to tortious interference and other tort claims where the gravamen of such claims is injurious speech. *See, e.g.*, *Price v. Armour*, 949 P.2d 1251, 1258 (Utah 1997) (applying judicial proceeding privilege to tortious interference claims); *Agee v. Morton Thiokol, Inc.*, 977 F.2d 595, at *2 (10th Cir. 1992) ("Utah courts have recognized a conditional privilege ... in both defamation cases, and intentional interference with prospective economic relations cases." (citation omitted)) (unpublished); *Watkins v. Gen. Refractories Co.*, 805 F. Supp. 911, 918 (D. Utah 1992) (applying Utah's conditional publisher's interest privilege to tortious interference claim); *Searle v. Johnson*, 646 P.2d 682, 685, 689 (Utah 1982) (First Amendment privilege to petition government under *Noerr-Pennington* doctrine applies to tortious interference claims); *Bates v. Utah Ass'n of Realtors*, 2013 UT App 34, ¶ 3, 297 P.3d 49 ("To ensure that claims with defamation underpinnings are not recast and cleverly titled ... to sidestep the one-year limitations period [for defamation] ... 'the statute of limitations for defamation governs

[24] These principles apply to the defamation limitations and privileges at issue in this case, including: (1) defamatory meaning, *Harman v. Heartland Food Co.*, 614 N.W.2d 236, 241-42 (Minn. Ct. App. 2000) (statement incapable of conveying defamatory meaning cannot support tortious interference claim); (2) opinion, *Jefferson Cty. Sch. Dist. No. R-1*, 175 F.3d at 856-58 (nonactionable expressions of opinion cannot support tortious interference claim); (3) truth, *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972-73 (3d Cir. 1985) (true facts cannot support tortious interference claim); and (4) conditional privilege, *Snyder v. Am. Kennel Club*, 402 F. App'x 397, 402 (10th Cir. 2010) ("Occasions privileged under the law of defamation are also occasions in which interference with contractual relations may be considered justified or privileged." (internal quotations omitted)).

claims based on the same operative facts that would support a defamation action.'" (quoting *Jensen*, 2005 UT 81, ¶ 53)).

The viability of MVP's tortious interference claim thus depends on whether the speech on which it is based is actionable. And because none of the Statements at issue are actionable as defamation, MVP's tortious interference claim fails as a matter of law.

CONCLUSION

For all of the foregoing reasons, this Court should grant Dillard's Motion and dismiss MVP's claims with prejudice.

RESPECTFULLY SUBMITTED this 9th day of September, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2019, I filed the foregoing **MOTION FOR JUDGMENT ON THE PLEADINGS** via the court's electronic filing system, which served the following:

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